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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 735

RIVOLI TRUCKING CORPORATION,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

The petition of Rivoli Trucking Corporation prays that a writ of certiorari issue to review the order of the United States Court of Claims entered in the above entitled case on October 9, 1964, granting defendant's motion for summary judgment dismissing the petition.

The written order of the Court below is at this time unreported and is printed herein, *infra*, page 7.

Jurisdiction of this Court is invoked under 28 United States Code section 1255(1).

Facts.

During the times recited in the petition as presented to the United States Court of Claims, petitioner rendered trucking and other services at the instance and order of

Respondent, of the reasonable value of $877,500.63. Respondent has failed, and neglected to pay this sum or any part thereof although due demand therefor has been made.

On or about June 14, 1963, Petitioner commenced an action in the United States District Court for the Southern District of New York, against the United States, Index No., 63 Civ. 1766, wherein petitioner alleged:

> "1. This action arises under an Act of Congress regulating interstate and foreign commerce, 67 Stat. 541; Article 1, Section 8 Article III section 2, the Fourth, Fifth, Thirteenth and Fourteenth Amendments to the Constitution of the United States and the matter in controversy exceeds the sum of three thousand ($3,000.00) dollars, exclusive of any claim for interest or costs and this Court has jurisdiction to hear and decide the issues involved herein pursuant to 28 United States Code 1331; 28 United States Code 1337, and the Defendant has consented to be sued herein, such consent is announced at 28 United States Code 1346 2 (b).
>
> "3. Whenever reference is made in this complaint by plaintiff to the Federal Maritime Board, it shall be taken to mean and plaintiff intends to refer to the Federal Maritime Board, as Defendant's agent, servant and employee, that ordered plaintiff's services and chartered plaintiff's trucks and took or did cause to be taken and used property belonging to plaintiff and that during all of the times mentioned herein the said Federal Maritime Board was the Defendant's duly appointed and qualified agent, servant and employee acting within the scope of the authority of its office and employment and under the authority duly delegated to it by the Defendant.
>
> "4. The Defendant owes plaintiff the sum of $877,500.63 for work, labor and services performed during the period of time between January 1, 1954

and April 8, 1958, at the special instance and demand of the Defendant's agent, the Federal Maritime Board. No part of the aforesaid sum has been paid and it remains unpaid.

"AS AND FOR A SECOND CAUSE OF ACTION

"5. Plaintiff repeats and re-alleges the allegations set forth at paragraphs numbered 1, 2, 3, above with the same force and effect as though those allegations were set forth at length in this cause of action.

"6. From January 1, 1954 until April 8, 1958 plaintiff performed work, labor and services for the Defendant at the special instance, request and demand of the Defendant's agent, servant and employee, the Federal Maritime Board, of the value of $877,500.63. No part of the aforesaid sum has been paid and it remains unpaid.

"WHEREFORE plaintiff prays judgment against the Defendant in the amount of $877,500.63."

On or about September 5, 1963, the United States District Court for the Southern District of New York entered an order in said suit, transferring the suit to the United States Court of Claims, as follows:

MEMORANDUM #29,160 (unreported)

"Plaintiff, Rivoli Trucking Corp., (Rivoli) has brought an action against the United States alleging in substance that the government owes it $877,500.63, for work, labor and services performed between January 1, 1954 and April 8, 1958". Defendant moves for summary judgment alleging among other things that this Court has no jurisdiction. M. Maurice Graham (Graham) plaintiff's attorney in this action and its vice-president during the period referred to above has also moved to intervene as a plaintiff in this action.

Rivoli's action is the latest in a series of law suits and legal manoeuvers apparently growing out of the same events. The complaints in the prior actions were dismissed and plaintiff's attempts to amend its complaints were denied, see Rivoli Trucking Corp. *v.* New York Shipping Ass'n. 167 F. Supp. 940 and 167 F. Supp. 943; Rivoli Trucking Corp. *v.* District Director 162 F. Supp 53, see also Rivoli Trucking Corp. *v.* United States 62 Civ. 2484, unpublished opinions on McGohey, J. Levet, J. and Bryant, J. dated October 4, 1962, February 8, 1963 and May 28, 1963 respectively.

Rivoli's latest complaint alleges various jurisdictional basis including 67 Stat 541 (1953); Article 1. P. 8 Article III P. 2 of the United States Constitution and the Fourth, Fifth, Thirteenth and Fourteenth Amendments thereto, 28 U. S. C. 1331 and 1337 and that the Defendant has consented to be sued and that such consent is announced at 28 U. S. C. 1346 2 (b).

Plaintiff's action is clearly based upon contract express or implied. Since it has a claim against the United States, none of the jurisdictional basis cited will suffice unless they grant jurisdiction to this Court to hear a claim of this sort against the United States. The only Statute remotely in point cited by plaintiff is 28 U. S. C. 1346 (b), popularly known as the Federal Tort Claims Act. However, this Act does not confer jurisdiction here because plaintiff's claim is not a tort claim. Even if it were, it would be barred because for claims of this sort there is a two year statute of limitations (28 U. S. C. 2401 (b)), which has run.

It is more probable that plaintiff's complaint seeks to invoke 28 U. S. C. 1346 (a) (2) more popularly known as the Tucker Act. The pertinent portion of that Act provides that the District Courts shall have original jurisdiction of a civil action or claim against the United States:

> "not exceeding $10,000.00 in amount founded either upon the Constitution, or any Act of Congress or any regulation of an executive department or upon any

express or implied contract with the United States or for liquidated damages in cases not sounding in tort. (emphasis added).

Plaintiff's claim clearly falls within the category of "express or implied contract with the United States" but it just as clearly seeks recovery of a sum well over $10,000.00. Therefore this Court does not have jurisdiction to entertain the claim. The statutory framework for contract claims against the Government allows claims of over $10,000.00 to be asserted only in the Court of Claims. (Ove Gustaveson Contracting Co., *v.* Floete 278 F. 2nd 912; 364 U. S. 894. It is possible that plaintiff may wish to waive the portion of its claim in excess of $10,000.00; see United States *v.* Johnson 153 F. 2nd 846; Jones *v.* United States 127 F. Supp. 31. Should it fail to do so this Court rather than dismiss the complaint will order the case transferred to the Court of Claims, such transfer being "in the interest of justice". 28 U. S. C. 1406 (c).

In view of the above it is unnecessary to deal with the other alleged basis upon which the Defendant urged dismissal of the complaint or to rule on Graham's application to intervene.

The case shall be transferred to the Court of Claims unless within 10 days from the date hereof plaintiff files an amended complaint reducing the damages claimed to no more than $10,000.00. In that event Defendant may renew in this Court the motion for summary judgment on the basis other than lack of jurisdiction set forth in the papers. So ordered.

Dated: New York, N. Y.
September 5, 1963

WILFRED FEINBERG,
U. S. D. J.

Upon the strength of the directive of the United States District Court for the Southern District of New York, as above set forth, Petitioner commenced an action against the United States in the United States Court of Claims and in No. 325-63 it alleged:

> "1. At all of the times mentioned herein Plaintiff, Rivoli Trucking Corporation, was and still is a corporation duly organized and existing under and by virtue of the laws of the State of New York with an office and place of business at 108 Front Street, City and State of New York.
>
> 2. At all of the times herein mentioned, Defendant United States of America, was and still is a corporation sovereign which has consented to be sued herein, such consent is announced at title 28 United States Code 1346 (a) (2); Judiciary and Judicial Procedure Section 1491 and this claim has been transferred to this Court by order of the United States District Court for the Southern District of New York, made, dated and entered September 5, 1963, 63 Civ. 1766.
>
> 3. From on or about January 1, 1954 until on or about April 8, 1958, Plaintiff performed work, labor and transportation of cargo services and furnished motor vehicles to the Defendant at the special instance, request, order and demand of the Defendant's agents, servant and employee, the Federal Maritime Board, of the value of $877,500.63 and no part of the said sum has been paid and it remains unpaid.
>
> 4. The Defendant owes Plaintiff the sum of $877,500.63 for work, labor and cargo transportation services requested during the period of time between or about January 1, 1954 until on or about April 8, 1958 and performed at the special instance, request, demand and order of the Defendant's agent, servant and employee, the Federal Maritime Board and no

part of the aforesaid sum has been paid and it remains unpaid.

5. The Plaintiff is the sole owner of the claim herein set forth and no transfer or assignment thereof or of any part thereof or interest therein has been made, except that the Defendant has asserted a claim of $37,107.72, against Plaintiff for the alleged non-payment of taxes.

Wherefore plaintiff prays for judgment in the sum of 840,392.91 in this action and for such other and further relief as may be just and proper."

In an order dated October 9, 1964, the United States Court of Claims held that:

"ORDER

"This case comes before the Court on Defendant's motion and plaintiff's cross motion for summary judgment. Upon consideration thereof, and without oral argument, it is concluded that plaintiff is not entitled to recover. See Rivoli Trucking Corporation *v.* American Export Lines, et al., 167 F. Supp. 937 E. D. N. Y. (1956); Rivoli Trucking Corporation *v.* New York Shipping Ass'n., et al 167 F. Supp. 940, S. D. N. Y. (1956), rehearing denied June 15, 1957; Rivoli Trucking Corporation *v.* New York Shipping Ass'n., 167 F. Supp. 943 (1957); Rivoli Trucking Corporation *v.* Thomas E. Scanlon, 162 F. Supp. 53, E. D. N. Y. (1958).

IT IS THEREFORE ORDERED that the Defendant's motion for summary judgment be and the same is granted, plaintiff's cross motion for summary judgment is denied and plaintiff's petition is dismissed.

By the Court

WILSON COWEN
Chief Judge

Date: October 9, 1964."

Questions Presented.

1. Whether Petitioner is without a forum in which to enforce its rightful claims.

2. Whether under the law of the United States, petitioning carrier has a right to assert, or is entitled to a remedy, to collect, under that law, a debt due, which the United States owes to petitioner arising out of and on account of work, labor and services furnished and performed; but which said debt or account receivable, the United States refuses to recognize, to pay, has not paid, and still refuses to pay, and,

3. Whether under the circumstances set forth at "2" above, the local United States Director of Internal Revenue rightfully imposed upon the persons of the officers of the petitioning corporation, a 100% penalty tax assessment at a time when such tax collector knew and had knowledge that not alone was the United States indebted to the petitioning corporation, but that such tax collector also knew and had knowledge that the said officers of the petitioning corporation, at no time, ever had in their personal possession to enjoy, any part of the taxes claimed due to the United States by the corporation and the said officers never signed or gave the Director of Internal Revenue any instrument in writing under which the said officers undertook to pay the tax debt of the petitioning corporation, claimed due by the United States.

Reasons for Granting the Writ.

On or about August 12, 1953, the Congress of the United States, pursuant to the authority vested in it under Article I Section 8 of the Constitution of the United States, adopted

and approved the following rule, regulation and directive in connection with the handling of foreign and interstate commerce in the Port of Greater New York and at Public Law 252-83rd Congress, 67 Stat. 541 said:

> ". . . the function of loading and unloading trucks and other land vehicles at the piers and other waterfront terminals can and should be performed, as in every other American Port, without the evils and abuses of the public loader system, and by the carriers of freight by water, stevedores and operators of such piers and other waterfront terminals OR THE OPERATORS OF SUCH TRUCKS OR OTHER LAND VEHICLES". (emphasis added.)

On or about February 24, 1959, there came to light in Federal Maritime Board Docket Number 800, 801, 821, the contradictory, contrary and overriding rule and regulation of the Federal Maritime Board which, during all of the times mentioned in the complaints and petitions of petitioning carrier corporation, prevented and prohibited petitioner from serving or working for the owner or consignee of the goods, wares and merchandise, imported or about to be exported, in that the said Federal Maritime Board, approved and adopted the following rule, regulation and practice:

> "We read the Compact (67 Stat. 541) as making it unlawful for anyone other than the five categories mentioned to load and unload trucks but not as requiring that truckers as one of the five mentioned categories must be permitted to load and unload trucks. . . . Truck loading and/or unloading at any pier or waterfront terminal operated by a participating terminal operator at the Port of Greater New York and vicinity shall be performed solely by such terminal operator, his agent, servants and employees at the

> rates and subject to the rules, regulations and practices contained in this tariff and that the tariff shall contain rules, regulations and practices prohibiting the loading and unloading of trucks at piers or other waterfront terminals in said Port by anyone other than the operators of said piers and waterfront terminals and that truckers shall provide a truck which is adequate and suitable for loading and unloading."

It is submitted that it must follow from a reading of the above, that either the several United States District Courts were in error or the United States Court of Claims erred in their respective conclusions on both aspects of the case. It must be remembered and it is of the utmost importance to bear in mind that it was the petitioner that was the owner of all of the land motor vehicles that were taken or caused to be taken in the carriage of goods imported or about to be exported from the United States, pursuant to and under the orders, demands, requests and command of the Defendant's agents, servants and employees, so that petitioner was working for the Defendant in that it was the Defendant's agents that prohibited the petitioner from working for or serving the consignee or owner of the goods.

If there could be any doubt on the construction of the rules, regulations and practices approved and adopted by the Federal Maritime Board, it is clear that those rules were intended to disregard the directive of Congress so as to work an impressment of land vehicles belonging to petitioner into the service of the Defendant for the reason that the contract of carriage which petitioner entered into with the owner or consignee of the goods was knowingly and intentionally prohibited and thus petitioner was prevented by the Defendant's agents from working for the owner or

consignee of the goods and petitioner was at all times forced and compelled to work for the Defendant.

Petitioner believes and avers that it has long been the rule that it is the Congress of the United States that makes and prescribes the rules and regulations under which the interstate and foreign commerce of the United States is carried on, further, it is written that no subordinate agency, bureau or person, shall deny to any "person" within the jurisdiction of the United States, the equal protection of its laws. The United States acts by its legislative, its judicial and its executive officers, it can act in no other way. The constitutional provision therefore must mean that no "bifurcate agency" of the United States, see (Report of the Antitrust Subcommittee, Subcommittee No. 5 on the Judiciary, House of Representatives, Eighty Seventh Congress H Res. 56, March 1, 1962), or the officers or agents by whom its powers are exerted, shall deny to any "person" within its jurisdiction the equal protection of the laws. Whoever, no matter how high or exalted his public office, or by virtue of his public position, under the guise of the august power of the United States Government, denies or takes away the equal protection of the laws, violates the Constitutional inhibition; as he acts in the name and for the United States and is clothed with the power of the United States, his act is that of the United States.

Petitioner believes and avers that the questions involved in this case are of such gravity and importance that they justify the exercise of the jurisdiction vested in this Court under the aforementioned provision to issue a writ of certiorari requiring the cause to be brought here for review from the Court of Claims or that the cause be remanded to the United States District Court for the Southern or

Eastern Districts of New York, whichever forum this Court deems proper.

Wherefore: Your petitioner prays that this Honorable Court will cause the writ of certiorari to be issued pursuant to the power vested in this Court at 28 United States Code 2106.

Respectfully submitted,

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